Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

JAMES L. CHANDLER, et al.,

Appellants,

v.

KATHERINE HARRIS, in her official capacity as Secretary of the State of Florida, et al.,

Appellees.

ON APPEAL FROM
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether multiple intervenors in a voter segregation suit, none of whom assert an affirmative demand for relief, may bar a settlement between the plaintiffs and the state by withholding their consent.

2. Whether the existence of racially segregated election districts constitutes an on-going and continuing violation of the civil rights of voters where elections remain to be held in the gerrymandered districts, or where the existing districts will be used by the Department of Justice as the baseline for preclearance of new election districts under Section 5 of the Voting Rights Act, so as to preclude dismissal of the voter's suit under the doctrine of laches.

PARTIES TO THE PROCEEDING BELOW

Appellants/Plaintiffs

Thomas S. Fouts
F. Evelyn McLean
James D. Moore
Carvel L. Gonzales
Harvey E. Oyer, Jr.
James L Chandler
Cecile N. Demers
Charles Bertheas

Appellees/Defendants

Katherine Harris, Secretary of State of Florida
Sandra Mortham, former Secretary of State of Florida
Toni Jennings, President of Florida Senate
John Thrasher, Speaker of the Florida House of Representatives
Daniel Webster, former Speaker of the Florida House of Representatives
Jeb Bush, Governor of the State of Florida
Lawton Chiles, former Governor of the State of Florida

Appellees/Intervenors

Congresswoman Carrie P. Meek
Congresswoman Ileana Ros-Lehtinen
Congressman Alcee L. Hastings
Congressman Peter Deutsch
Florida State Senator Daryl Jones
Florida State Senator Mandy Dawson-White
Florida State Conference of NAACP Branches
Black Business Association

Gerald Adams
George Baldwin
Ethel Beckford (dec.)
Willie Brown
Alben Duffie
Larry D. Jones
Edwin L. Miller
Frankie S. Rolle
Elry Sands
Carolyn L. Williams
M. Athalie Range
Betty T. Ferguson
Marleine Bastieu
Dr. Bradford E. Brown
Bennie Moore
Ernest Mae ("Pinky") Sands
Miriam Urra

Amicus Curiae

US Department of Justice, Civil Rights Division,
Voting Section

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OFFICIAL REPORT CITATION

There is no official report citation of the three judge panel district court decision. The decision is reproduced in the appendix.

JURISDICTION

(i.) The Final Order of dismissal was entered by the Three Judge Court on October 25, 1999.

(ii.) The Three Judge Court's Order denying Plaintiffs' Motion to Alter or Amend Judgment and/or for Reconsideration of Final Order of Dismissal was entered on December 17, 1999.

(iii.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1253.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

28 U.S.C. §1253: Direct appeals from decisions of three judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Amendment 15, United States Constitution:

The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race...

STATEMENT OF THE CASE

This case presents two questions for the Court's consideration: can intervenors in a voter segregation suit, none of whom assert an affirmative demand for relief, preclude a settlement between the plaintiffs and the state by withholding their consent; and does the existence of a racially segregated election district constitute a continuing violation of the civil rights of citizens who have been relegated to minority status. The plaintiffs believe that the first question was adequately answered in *Lawyer v. Department of Justice*, 521 U.S. 567, 138 L.Ed.2d 669, 117 S.Ct. 2186 (1997) and that the district court misconstrued the ruling in that case, and that the second question was adequately answered in *Reno v. Bossier Parish School Board*, ___U.S.___, Docket # 98-405 (Jan 24, 2000)[1] which had not been entered at the time the district court made its decision. To understand the issues better, it is helpful to understand the history of the creation of Florida's election districts, beginning in 1992.

The creation of Florida's State Senate districts in 1992 has previously been addressed by this court on at least two occasions. See *Lawyer*, *supra*, and *Johnson v. De Grandy*,

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[1] The opinion can be found on the internet at http://laws.findlaw.com/US/000/98-405.html

512 U.S. 997 (1994). A distinction separates Florida's congressional redistricting history from the state senatorial redistricting. Florida's congressional districts were initially created by a federal court order. The Florida Senate districts were initially enacted by the Florida Legislature.

In 1992 a three-judge panel[2] sitting in the United States District Court for the Northern District of Florida enacted a congressional districting plan which configured the congressional district boundaries in the State of Florida to create eighteen majority white districts, three majority African-American districts (the 3rd, 17th, and 23rd districts) and two Hispanic-American districts (the 18th and 21st). See *DeGrandy v. Wetherell,* 794 F.Supp. 1076 (N.D. Fla. 1992)[3]. The result of the decision in *DeGrandy* was to make Florida's congressional districts the least compact and most dispersed

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[2] Eleventh Circuit Judge Hatchett, District Judge Vinson, and District Judge Stafford.

[3] Hereinafter, "*DeGrandy*" refers to the district court opinion on congressional redistricting in *De Grandy v. Wetherell* 794 F.Supp. 1076 (N.D.Fla. 1992) and not the district court decision on the redistricting of the Florida Legislature in *DeGrandy v. Wetherell*, 815 F.Supp. 1550 (N.D. Fla. 1992) affirmed *sub nom Johnson v. DeGrandy*, 512 U. S. 997 (1994).

congressional districts in the nation.[4]

Florida has five counties whose electoral procedures are subject to preclearance by the U.S. Department of Justice under §5 of the Voting Rights Act, 42 U.S.C. §1973 et seq. Those counties are Collier, Hardee, Hendry, Hillsborough, and Monroe. See *DeGrandy v. Wetherell*, 815 F.Supp. 1550, 1558 fn. 7 (1992). Any changes to the 17th, 18th, or 23rd districts would entail changes to the electoral procedures in Monroe and Hendry Counties and hence would require preclearance by the DOJ.

On June 28, 1993 this Court decided the case of *Shaw*

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[4] Rating 435 congressional districts in the country by the amount they are dispersed, Florida's 22nd is the most dispersed at 435th; followed by Florida's 3rd at 429 (prior to the 1996 redistricting after *Johnson v. Mortham*); Florida's 17th at 430; Florida's 18th at 422, and Florida's 23rd at 415. See Appendix A to Congressional Districts: Objectively Evaluating Shapes, written by David C. Huckabee, Analyst in American National Government, Government Division, dated May 24, 1994 and Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after *Shaw v. Reno*, 92 Mich.L.Rev. 482 (1993).

For congressional districts, the dispersion and perimeter scores for congressional districts in effect from 1982-1992 are a far more accurate baseline for retrogression analysis than the districts in effect from 1992 to 2002. As District Judge Vinson stated when the districts were created "Without some objective geographical compactness standard to evaluate districts, the potential for future abuse in creating district boundaries is virtually unlimited." *DeGrandy*, 794 F.Supp at 1092, concurring opinion.

v. Reno, 509 U.S. 630, 125 L.Ed.2d 211, 113 S.Ct. 2816 (1993) which recognized the right of non-minority plaintiffs to assert a cause of action for violation of their civil rights arising out of the racial gerrymandering of congressional districts. After the ruling in *Shaw,* thirty-two white and Hispanic voters in North Florida challenged the court order in *DeGrandy* and filed a suit in the United States District Court, Northern District of Florida alleging that Florida's 3rd congressional district was an unconstitutional attempt to segregate voters by race. In April 1996, a three judge panel[5] agreed, see *Johnson v. Mortham*, 926 F.Supp. 1461 (N.D. Fla. 1996), and issued a ruling which found that "the direct evidence of the *DeGrandy* panel's purpose, as evidenced by its opinion, the Special Master's report and recommendation, and the independent expert's report, would support" a conclusion that the redistricting plan adopted by that court "cannot be understood as anything other than an effort to segregate voters on the basis of race"; that the segregation of

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[5] The panel which considered the case of *Johnson v. Mortham* consisted of two of the three judges (11th Circuit Judge Hatchett and District Judge Vinson) who decided *DeGrandy*. District Judge Stafford recused himself from the *Johnson* panel citing a potential conflict of interest, and was replaced by District Judge Paul. Judge Joseph Hatchett, who was on both panels, authored the majority opinion in *DeGrandy* which gerrymandered the districts in 1992 but dissented from the majority opinion in *Johnson v. Mortham* which declared that the 1992 plan was an unconstitutional racial gerrymander.

voters by race in Florida's 3rd congressional district was unconstitutional even though it had been accomplished by a federal court order; and that the redistricting plan ordered by the court for the State of Florida in 1992 was an interim plan, only to remain in effect until the Florida Legislature enacted a suitable permanent redistricting plan. *Johnson*, 915 F. Supp. 1551.

After the entry of the court's order in *Johnson*, the Florida Legislature, which was in session in the Spring of 1996, enacted a permanent redistricting plan on May 21, 1996, thereby replacing the interim plan imposed by the court. The permanent plan altered the configuration of the 3rd congressional district, but adopted in their entirety the boundaries of the 17th, 18th, and 23rd[6] congressional districts created by the court as part of the *DeGrandy* interim plan.

On April 2, 1998, less than two years after the enactment of the permanent redistricting plan, five white and Hispanic voters in South Florida commenced this action in the Southern District of Florida against the Governor, Secretary of State, President of the Senate, and Speaker of the House of the State of Florida. The suit alleged that Florida State Senate districts 30 and 40 and congressional districts 17,

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[6] Only the 3rd congressional district and the six districts with which it shared a common boundary were changed by the 1996 legislation.

18, and 23 were created in an unconstitutional attempt to segregate voters by race and sought an order setting aside the statutes creating the districts.

After the suit was filed, the congressmen representing the 17th, 18th, and 23rd districts, Congresswoman Carrie Meek, Congresswoman Ileana Ros-Lehtinen, Congressman Alcee Hastings, their supporters, and various interests supporting the existing Florida Senate districts, were granted leave to intervene in the action as defendants (hereinafter the "intervening defendants" or "intervenors"). The plaintiffs asserted a general objection to the intervention of non-parties because "past experience has shown the purpose of the intervention is often to attempt to influence the court to sacrifice the civil rights of the Plaintiffs to public opinion and political considerations." However, on the basis of a ruling on the same issue in *Johnson*, *supra*, at 1538 the congressmen, senators, and their supporters were permitted to intervene.

A three judge panel was appointed in January of 1999 and in March of 1999 the plaintiffs made a settlement proposal to the defendants. Under the proposal, they would withdraw their objection to the Florida Senate districts if the congressional districts in the State of Florida were redrawn using fixed mathematical criteria known as a perimeter score and a dispersion score based upon the calculations contained

in the 1994 Congressional Research Service report entitled Congressional Districts: Objectively Evaluating Shapes[7]. The limits proposed by the plaintiffs were a minimum dispersion score of .16 and perimeter score of .13, the same scores as held by the most irregular district in effect in Florida before the 1992 redistricting. The settlement proposal was favorably received by the defendants and the staff of the Florida Legislature, which had the computer equipment necessary to re-draw the districts, began preparing proposals for the parties to evaluate.

The settlement discussions were intentionally conducted without the participation of most of the intervening defendants. The decision of the plaintiffs and defendants to conduct settlement negotiations in private was based upon the understanding that the intervening defendants sought no affirmative relief in the suit and therefore were not necessary parties to the settlement. They had volunteered to join the litigation and appeared for the sole purpose of seeing that no changes were made to electoral districts, regardless of the unconstitutionality of the existing districts. It was accurately predicted that there was no settlement to which they would

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[7] The Congressional Research Service, which published the report on objectively evaluating shapes of congressional districts, is a branch of the Library of Congress established pursuant to 2 U.S.C. §166 Subsection (d)(5).

agree.

The conclusion which the plaintiffs and the defendants reached, that the lack of consent of the intervening defendants would not preclude a settlement, was substantially based upon the principles set forth in *Lawyer v. Department of Justice*, *supra*, at 681 which stated:

> It has never been supposed that one party--whether an original party, a party that was joined later, or an intervenor--could preclude other parties from settling their own disputes. *Firefighters v. Cleveland*, 478 U.S. 501, 528-529 (1986). While appellant [Lawyer] was entitled to present evidence and have his objections heard at the hearing to consider approval of the agreement, he "does not have power to block the decree merely by withholding [his] consent."

The plaintiffs would not have entered into settlement discussions with the defendants if it was believed that the consent of the intervenors was required, since such discussions would have been futile.

In July 1999 all of the plaintiffs and all of the defendants reached a settlement. The settlement agreement

was finalized and filed with the court in August of 1999[8]. It provided that the plaintiffs would voluntarily dismiss their suit against Florida Senate Districts 30 and 40 in exchange for a redrawing of the congressional district lines in congressional districts 18, 19, and 23. Because the districts shared common boundaries with the 16th, 17th, 20th, 21st, and 22nd districts, the settlement also affected their shapes, an effect known as the "ripple effect." Based upon the settlement, a hearing on pending motions which had been set for August 23rd was canceled and the intervening defendants were given an opportunity to submit objections to the Joint Motion to Approve Settlement. The hearing on pending motions was then reset by the court for October 12, 1999.

After it had been filed, the plaintiffs received informal reports that Governor Bush, who was a signatory to the settlement, would ask the court to disapprove the settlement agreement unless the intervening defendants agreed with the

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[8] Congressman Alcee Hastings was provided with a copy of the proposed districts on July 21, 1999.

shape of the congressional districts that would be created. In an effort to head off the Governor's objections, the plaintiffs moved to voluntarily dismiss Governor Bush as a party. On October 6, 1999 seven weeks after signing the settlement agreement and six days before the hearing on the Joint Motion to Approve Settlement, Governor Bush filed a pleading entitled "Notice of Defendant Jeb Bush" in which he "maintained that he is not a necessary party to this action and that he should be dismissed", but further stated:

> Defendant Governor Jeb Bush hereby gives notice to the Court that the "settlement agreement" signed by the undersigned counsel on his behalf has not yet been signed by all parties to the litigation [i.e. it was not signed by the intervening defendants], and thus does not represent a valid "settlement" appropriate for consideration by this Court at this time...the proper parties to any settlement would include not only the plaintiffs and the defendants, but also those who have been granted party status by virtue of the Court's order admitting them as intervenors.

The asserted basis for the Governor's decision to recommend that the district court disapprove the settlement was he learned that the intervening defendants were not

signatories to the settlement after he authorized his attorney to sign it and he then "announced he would not continue to support the settlement agreement absent agreement of all the parties, including the intervenor-parties."

In accordance with their obligations under the settlement agreement, at the commencement of the October 12, 1999 hearing, the plaintiffs voluntarily dismissed their claims as to Senate Districts 30 and 40.[9] After the voluntary dismissal of the claims regarding the Senate Districts, the Speaker of the Florida House of Representatives publically announced that he would join the position of Governor Bush that the consent of the intervenors was necessary to effect a settlement[10].

The congressional redistricting plan itself was never

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[9] The plaintiffs had been informally advised of the Speaker's intent to join the position of the Governor an hour before the hearing.

[10] The district court asserted in its order that Katherine Harris, the Florida Secretary of State also joined the Governor's position. This is incorrect. Secretary Harris, along with the Florida Senate, continues to join in the Joint Motion to Approve Settlement without the agreement of the intervenors.

reviewed by the district court. Neither Governor Bush nor Speaker Thrasher filed motions to set aside the Joint Motion to Approve Settlement or the Joint Settlement Agreement. The district court never reached the question of whether, and under what circumstances Governor Jeb Bush and Speaker of the Florida House John Thrasher could be permitted to require the consent of the intervenors as a condition of settlement. As a result of the hearing held on October 12, 1999 the three judge court denied the Joint Motion to Approve Settlement.

The district court went on to consider the motions to dismiss on the basis of laches which had been filed by the defendants and intervenors. The plaintiffs argued that their cause of action against the State of Florida accrued when the Florida Legislature enacted the districts in 1996, that the existence of the districts was an on-going civil rights violation precluding the application of the doctrine of laches, and that the effect which the shape of the existing districts would have on the of the redistricting process after the census made dismissal inappropriate. They further argued that since their

suit had been filed two years and eight months before 2000 elections, that redistricting before those elections was not overly burdensome to the State or its voters. The district court found that since three election cycles had passed when the plaintiffs filed their suit, and one election remained before redistricting in 2002, the defendants had been prejudiced and dismissed the suit. A subsequent motion for reconsideration and/or to alter or amend judgment was denied.

ARGUMENT

SINCE ONLY THE PLAINTIFFS SOUGHT AFFIRMATIVE RELIEF IN THIS MATTER, THE DISTRICT COURT ERRED IN DENYING THE JOINT MOTION TO APPROVE SETTLEMENT BASED UPON THE OBJECTION OF THE INTERVENING DEFENDANTS. THE SETTLEMENT DID NOT IMPOSE DUTIES OR OBLIGATIONS ON THE INTERVENORS, NOR DID IT DISPOSE OF ANY CLAIM THEY MIGHT HAVE AND THEREFORE THEIR OBJECTION COULD NOT PRECLUDE A SETTLEMENT.

The district court's decision to deny the Joint Motion

to Approve Settlement was based upon the dissatisfaction of the intervenors with the settlement. However, the assertion by the Governor and Speaker of the House that the consent of the intervenors was essential to effect a settlement formed an important subtext to the district court's reasoning. The plaintiffs believe, based upon *Lawyer v. Department of Justice*, 521 U.S. 567, 138 L.Ed.2d 669, 117 S.Ct. 2186 (1997), that the Governor, Speaker, and district court were incorrect in concluding that the consent of the intervenors was required. The settlement did not dispose of any right the intervenors have, it did not displace any of the incumbents out of their existing districts, nor was it a particularly drastic change to the existing districts[11]. Further, since the only basis

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[11] The Florida Legislature did not use the same procedures for determining the perimeter and dispersion ratios which were used in the Library of Congress, Congressional Research Report to Congress, Congressional Districts: Objectively Evaluating Shapes, or in Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno, 92 Mich.L.Rev. 482 (1993). Consequently, the districts contained in the settlement agreement are not free from the vestiges of voter segregation, but represent a step in the right direction.

for the Governor's and Speaker's recommendation to the district court that the motion be disapproved was the dissent of the intervenors, the motion to approve should have been granted.

In denying the Joint Motion to Approve Settlement the district court distinguished this case from *Lawyer* by asserting that since the settlement would frustrate the objectives of the intervening defendants, it must be disapproved. However, *Lawyer* does not turn on the question of whether the settlement frustrates the intent of the objecting parties, only whether it deprives them of some right secured by law. The sole objective of the intervening defendants in this suit was to prevent the plaintiffs from gaining any relief.[12]

The Governor's defense to the approval of the settlement is that he entered into it based upon a unilateral

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[12] The *ad damnum* clause in the answer of Congresswoman Ileana Ros-Lehtinen is representative of the objectives of each of the intervening defendants. Her request was that the district court "...dismiss the complaint with prejudice..." Neither Congressman Alcee Hastings, Congresswoman Carrie P. Meek, nor the other intervenors included a demand for affirmative relief in their answers.

mistake of fact---that the settlement was agreed to by the intervening defendants. There is no dispute that the Governor's counsel was aware that the intervening defendants were not parties to the settlement. Furthermore, there is no dispute that the consent of the intervenors was never a condition of the settlement before it was signed by the plaintiffs and the defendants and filed with the court. The Governor's representatives were aware that this Court had asserted in *Lawyer* that the consent of the intervenors was not necessary to reach a settlement and that the objection of the intervenors could not preclude a settlement between the plaintiffs and the defendants. In fact, counsel for Governor Bush successfully argued the *Lawyer* case before the Supreme Court on behalf of then Governor Lawton Chiles. Consequently, the "Notice" filed by Governor Bush was little more than a post-settlement attempt to add conditions to the settlement which were not part the initial agreement and under which a settlement could never be reached. There was no settlement proposal which altered the boundaries of the

congressional districts to which the intervenors, congressmen who benefitted from the gerrymandered boundaries and their supporters, were prepared to agree.

In order for parties in civil rights litigation to engage in meaningful settlement negotiations, they must feel confident that once an agreement is reached, and the parties have set their signatures to it, "the discretion of the federal court is limited except to the extent that the [new/stipulated] plan itself runs afoul of federal law." *Lawyer*, *supra*, at 138 L.Ed.2d at 680. If the new plan does not run afoul of federal law, the district court should approve it. The district court should have found that the consent of the intervenors was not a prerequisite to the approval of the settlement, and approved it over the argument of the Governor and Speaker, that the intervenor's consent was necessary.

THE SEGREGATION OF VOTERS INTO ELECTION DISTRICTS BY RACE IS A DENIAL OF THE RIGHT OF A CITIZEN TO FREELY PARTICIPATE IN ELECTIONS WHICH RECUR WITH EACH ELECTION. THEREFORE LACHES IS NOT A VALID DEFENSE

WHERE AN ELECTION IS STILL TO BE HELD IN THE SEGREGATED DISTRICT OR WHERE THE EXISTING DISTRICTS WILL BE USED BY THE DEPARTMENT OF JUSTICE AS THE PRECLEARANCE BASELINE UNDER SECTION 5 OF THE VOTING RIGHTS ACT FOR DETERMINING WHETHER RETROGRESSION HAS OCCURRED IN THE CREATION OF NEW ELECTION DISTRICTS.

The district court found that the plaintiffs' claims were barred by laches[13] even though the 2000 congressional elections were still a year away, the districts in effect from 1992 to 2002 would be used as a baseline or benchmark by the Department of Justice for retrogression analysis in the preclearance of the 2002 redistricting[14], and the defendants had waived the defense of laches when they entered into a

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[13] In *Johnson v. Mortham*, 915 F.Supp at 1534, the three judge district court found that the injuries suffered by voters in Florida as a result of the 1992 racial gerrymandering were "current and ongoing."

[14] Section 51.44 of Title 42 of the Code of Federal Regulations section implementing the Voting Rights Act sets the existing voting practice as the benchmark. It states "In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission."

settlement agreement. After the district court entered its order of dismissal, this Court published its most recent decision in *Reno v. Bossier Parish School Board*, ___U.S.___, Docket number 98-405 (Jan 24, 2000), which addressed the second of those issues. The appellees in *Bossier* argued that the case was moot because no further elections were to be conducted in the challenged districts. In the opinion, entered January 24, 2000, this court dismissed that argument stating:

> Like every other political subdivision of the State of Louisiana, Bossier Parish, because of its history of discriminatory voting practices, is a jurisdiction covered by §5 of the Voting Rights Act. See 42 U.S.C. §1973c 1973b(a), (b); 30 Fed. Reg. 9897 (1965). It is therefore prohibited from enacting any change in "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," without first obtaining either administrative preclearance from the Attorney General or judicial preclearance from the United States District Court for the District of Columbia. 42 U.S.C. § 1973c.....appellee argues, the District Court's declaratory judgment with respect to the 1992 plan is no longer of any moment and the dispute no longer presents a live "case or controversy" for purposes of Article III of the Constitution.....**[I]n at least one respect the**

> **1992 plan will have probable continuing effect: Absent a successful subsequent challenge under §2, it, rather than the 1980 predecessor plan–which contains quite different voting districts–will serve as the baseline against which appellee's next voting plan will be evaluated for the purposes of preclearance. Whether (and precisely how) that future plan represents a change from the baseline, and, if so, whether it is retrogressive in effect, will depend on whether preclearance of the 1992 plan was proper.** [emphasis supplied]

The districts challenged in this case are subject to preclearance. Consequently, the continuing existence of segregated election districts in South Florida, and the question of whether those districts were properly precleared, will affect whether or not the 2002 redistricting plan bears any of the vestiges of the past segregation of voters.

The district court justified its dismissal of the plaintiffs case citing the cases of *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990) and *MacGovern v. Connolly*, 637 F.Supp. 111 (D. Mass. 1986). Those cases are distinguished from the case at bar by the fact that the suits were either filed after the last

election had been held before redistricting, or so close to the last election that redistricting was impractical[15]. There is no mention of the continuing effect that voter segregation will have on future redistricting. In each case, the court assumes that the new districts to be created after the census will be drawn in a non-discriminatory fashion. In this case, it is known that the Department of Justice will seek to use the 1992 plan as a benchmark for the 2002 redistricting, thereby perpetuating the odd shape of the districts into the next decade, and unless challenged, *ad infinitum*.

CONCLUSION

The plaintiffs ask this court to reverse the order of dismissal in light of this Court's decisions in *Lawyer* and

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[15] In *White v. Daniel,* the plaintiffs asserted a voting dilution cause of action against districts which had been enacted twenty years earlier. However, the suit was filed "months after the last election under the 1981 plan took place." In that case the court determined that "no new elections will be held for Brunswick County county supervisors until November 1991" which would be after the 1990 census and redistricting had taken place. *White*, *supra*, at 103. Similarly, in *MacGovern v. Connolly*, the plaintiffs' suit was filed "less than a month before nominations were due, roughly three months before the primary, and less than eight months before the 1986 general election" *MacGovern*, *id.*, at 115. The plaintiffs suit in this case was filed two years and seven months before the 2000 election.

Bossier and to enter a mandate directing the district court to grant the Joint Motion to Approve Settlement, conduct the "fairness hearing" mentioned in the settlement agreement, and enter its order on the new districts contained in the settlement prior to the May 8, 2000 qualifying for congressional elections.

Respectfully Submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 98-10031-Civ-Paine

THOMAS S. FOUTS, et al.,
Plaintiffs,

vs. Three Judge Court

KATHERINE HARRIS, et al.,
Defendants.
_____/

FINAL ORDER OF DISMISSAL

THIS CAUSE came before the Court upon the following motions: (1) Defendant Lawton Chiles' Motions to Dismiss (D.E.s 9, 11); (2) Defendant Sandra Mortham's Motion to Dismiss (D.E. 10); (3) Defendants Toni Jennings and Daniel Webster's Joint Motion to Dismiss (D.E. 13); (4) Defendant-Intervenors Daryl Jones and Mandy Dawson-White's Motion to Dismiss or For Summary Judgment (D.E. 66); (5) Meek Intervenors' Motion for Summary Judgment as to Count I (D.E. 68); (6) Florida State Conference of NAACP

Branches' Motion to Dismiss or, in the Alternative, for Summary Judgment (D.E. 69); (7) Joint Motion to Approve Settlement (D.E. 79); (8) Plaintiffs' Motion for Summary Judgment on the Liability Phase of Count I (D.E. 97); (9) Defendant-Intervenors Meek and Hasting's Motion to Strike Settlement Agreement (D.E. 105); and (10) NAACP's Motion to Reject Proposed settlement (D.E. 108). For the reasons discussed below, the Court (1) approves the dismissal of Count II and the portion of Count I relating to U.S. Congressional District 17; (2) declines to approve the purported settlement of this action; and (3) dismisses the remainder of the case based on the equitable defense of laches.

All parties were permitted to present oral argument on all of the pending motions and did so on October 12, 1999. In open court, the Plaintiffs dismissed the entirety of Count II of their Complaint as well as any claims directed to U.S. Congressional District Number 17. Upon due consideration, we permit and approve these dismissals. As a result, the motions relating to Count II and to the portion of Count I associated with U.S. Congressional District Number 17 are rendered moot and will be denied.

DISCUSSION OF REMAINING MOTIONS

1. Motion for Approval of Settlement

As a general rule, a "settlement" decree that provides

a remedy agreed to by some, but not all, of the parties cannot affect the rights of a dissenting party. *White v. Alabama*, 74 F.3d 1058, 1073-74 (11th Cir. 1996) (citing *United States v. City of Miami*, 664 F.2d 435, 442 (5th Cir. December 1981) (en banc)). Therefore,

> Parties who choose to resolve litigation through settlement may not dispose of claims of a third party... without that party's agreement. A court's approval of a consent decree between some of the parties cannot dispose of the valid claims of nonconsenting intervenors: if properly raised these claims remain and may be litigated by the intervenor.

Id. at 1074 (quoting *International Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986)).

Most of the numerous parties to the instant case were not involved in and object to the purported Settlement Agreement. The Agreement was entered into by five parties; the Plaintiffs; the Speaker of the Florida House of Representatives Thrasher; President of the Florida Senate Jennings; Florida Governor Bush; and Florida Secretary of State Harris. None of the intervening Defendants participated in the settlement. Moreover, since the filing of the Agreement, Governor Bush, Speaker Thrasher and Secretary of State Harris have disavowed their support for the settlement. Never-the-less, the Plaintiffs continue to assert

that the settlement should be approved over the objections of the numerous dissenting parties.

The Plaintiffs argue that *Lawyer v. Dep't of Justice*, 521 U.S. 567 (1997), supports their position that all parties need not agree to the settlement. However, although *Lawyer* involves a narrow exception, it actually reaffirms the general rule that a settlement agreement cannot be used to vitiate the rights of dissenting parties. Id. at 579.

Under *Lawyer's* narrow exception, parties can agree to settle and dispose of a dissenting party's claim when, through the settlement, the dissenting party achieves the essential goals of his suit. Id. at 579-80. In such a case the Supreme Court advises that a "sore winner" looking only for the additional satisfaction of a judgment will not be permitted to block a settlement. Id. Importantly, in describing the propriety of overriding the dissenting party's desire not to settle, the Court was careful to confirm that it would be "forbidden" to settle a redistricting claim over the objections of a party who was not obtaining his requested relief. Id. at 579.

Unlike the dissenting party in *Lawyer*, in the instant case, the dissenting Defendants' objectives in defending this action would be completely frustrated by the proposed settlement. Therefore, the narrow exception outlined in *Lawyer* does not apply to this case. Accordingly, the Motion

for Approval of Settlement will be denied.[1]

2. Motions to Dismiss

The Defendants argue that this action should be dismissed on the ground that the Plaintiffs lack standing to bring this suit. Alternatively, they argue that the action is barred by laches.

A. Standing

The Defendants assert that there is no Plaintiff with standing to challenge the constitutionality of a U.S. Congressional District number 23.[2] However, the Plaintiffs allege that Plaintiff Charles Bertheas is a resident of that district. Therefore, they have adequately alleged standing with respect to that district. See *United States v. Hays*, 510 U.S. 737 (1995).

B. Laches

In any event, notwithstanding that sufficient, if minimal, allegations have been pled to support standing with respect to U.S. Congressional District 23, for the reasons discussed below, we conclude that laches bars this action.

To state the defense of laches, a party must show:

---

[1] The related motions to reject or strike the settlement will be granted.

[2] The Court observes that there is no challenge to the plaintiff's' standing with respect to U.S. Congressional District number 18.

1. A delay is asserting a right or claim;
2. That the delay was not excusable; and
3. That the delay caused the party "undue" prejudice.

Citibank N.A. v. Citibanc Group, Inc., 724 F.2d 1540, 1546 (11th Cir. 1984).

Laches has been applied to bar actions challenging redistricting plans. See *MacGovern v. Connolly*, 637 F. Supp. 111 (D. Mass. 1986) (1986 Suit barred by laches where only viable claim challenged a 1977 apportionment plan); *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990) (1988 suit barred by laches where the redistricting plan occurred in 1971 and the legislature decided not to redistrict in 1981 in light of the 1980 census).

1. Relevant Factual Background

U.S. Congressional Districts 18 and 23 went into effect in 1992. See *DeGrandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992) (3 judge court). In 1993, Shaw v. Reno, 509 U.S. 630 (1993), made this type of case justiciable. There have been elections held in 1992, 1994, 1996 and 1998 based on these districts. In November of 2000, there will be one more election using the current 18th and 23rd U.S. Congressional Districts. Thereafter, the districts will be redistricted based on the 2000 census.

2. Analysis

(i) Delay

The Plaintiffs asset that there was no delay because the continuing existence of racially gerrymandered districts is an ongoing violation of citizens' constitutional rights. The Plaintiffs only cite to a single district court case in support of this argument. See *Dotson v. City of Indianola*, 514 F.Supp. 397 (N. D. Miss. 1981). Indeed, the Plaintiffs' "ongoing violation" argument is contrary to well settled reapportionment and laches case law. See e.g. *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990). Therefore, the Plaintiffs' theory of "ongoing violation" fails to preclude a finding of delay. Accordingly, we find that the Defendants have established that the Plaintiffs delayed in bringing this action for at least five years.

(ii) Excusability

The Plaintiffs also contend that any delay in their institution of this action was excusable because they did not know they had a cause of action until 1996, when a three-judge court ordered redistricting of the 3rd U.S. Congressional District (which also had been set up by *DeGrandy* in 1992). See *Miller v. Johnson*, 926 F.Supp. 1460 (N. D. Fla. 1996) (3 judge court). However, the *Johnson* decision did not create the instant Plaintiffs' claims, it merely recognized them. Therefore, this argument does not serve to excuse the Plaintiffs' delay in bringing this action.

(iii) Prejudice

Prejudice may be established by showing a disadvantage to the Defendants in asserting or establishing a claim, or some other harm caused by detrimental reliance upon the Plaintiffs' conduct. *White*, 909 F.2d at 102.

The Defendants assert that they are prejudiced by the Plaintiffs' delay in bringing this action because (1) over the six years and three election cycles voters have come to know their districts and candidates, and will be confused by change; and (2) requiring redistricting now, before the 2000 census will result in two redistrictings within a two year period, with resulting voter confusion, instability, dislocation, and financial and logistical burden on the state.

The dangers of such frequent redistrictings were the basis for the *White* court's decision to impose the defense of laches. The *White* court stated:

> [i]f we affirm the district court's order, the Board will be required to reapportion itself this year and it will probably be required to do so again next year, when the results of the 1990 census are available. We believe that two reapportionments within a short period of two years would greatly prejudice the County and its citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens.

White, 909 F.2d at 104 (emphasis added).

Moreover, if the Court were to impose redistricting before the 2000 census, such redistricting would necessarily be based upon 1990 census figures. Such old census figures have been recognized as unduly prejudicial because they fail to provide a basis for "fair and accurate representation for the citizens." *White*, 909 F.2d at 104.

Therefore, the defendants have established each of the three elements necessary to assert the defense of laches. Accordingly, the motions to dismiss will be granted as to that issue.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Plaintiffs' *ore tenus* dismissal of portions of their Complaint is APPROVED; accordingly, Count II and the portion of Count I relating to U. S. Congressional District Number 17 are DISMISSED;

2. Joint Motion to Approve Settlement (D. E. 79); and Plaintiffs' Motion for Summary Judgment on the Liability Phase of Count I (D. E. 97) are DENIED;

3. Defendant-Intervenors Meek and Hastings' Motion to Strike Settlement Agreement (D. E. 105); NAACP's Motion to Reject Proposed Settlement (D. E. 108) are GRANTED;

4. Defendant Lawton Chiles' Motions to Dismiss (D. E.s 9, 11); Defendant Sandra Mortham's Motion to Dismiss (D. E. 10); Defendants Toni Jennings and Daniel Webster's Joint Motion to Dismiss (D. E. 13); Florida State Conference of NAACP branches' Motion to Dismiss or, in the Alternative, for Summary Judgment (D. E. 69); are GRANTED; accordingly, Count I, in its entirety, is DISMISSED;

5. Defendant-Intervenors Daryl Jones and Mandy Dawson-White's Motion to Dismiss or for Summary Judgment (D. E. 66) ; and Meek Intervenors' Motion for Summary Judgment as to Count I (D. E. 68); are DENIED AS MOOT;

6. This case is closed and any pending motions, not otherwise resolved, are DENIED AS MOOT.

DONE AND ORDERED in chambers at West Palm Beach, Florida, this 25th Day of October, 1999.

Honorable Rosemary Barkett
United States Circuit Judge

Honorable Donald Graham
United States District Judge

Honorable James C. Paine
Sr. United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

THOMAS S. FOUTS, et al,

Plaintiffs,

v. CASE NO.: 98-10031-Civ-Paine

Three Judge Court

SANDRA MORTHAM, et al,

Defendants.

SETTLEMENT AGREEMENT

1. Plaintiffs, registered voters in Monroe, Miami Dade, Broward, and Palm Beach County, Florida, filed suit on April 12, 1998, seeking a declaratory judgment that the U.S. Congressional Districts 17, 18 and 23 and Florida State Senate Districts 30 and 40 are racial gerrymanders that violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as recognized in *Shaw v. Reno*, 113 S. Ct. 2816 (1993) and *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

2. Defendants and Defendant-Intervenors deny

these assertions.

3. The parties nonetheless do agree, for the purpose of settlement only, that there is a reasonable factual and legal basis for the plaintiffs' claims as it relates to U.S. Congressional Districts 17, 18 and 23, based upon the following stipulated facts:

(a) These congressional districts were established in 1992 by the United States District Court for the Northern District of Florida in *DeGrandy v. Wetherell,* 794 F. Supp. 1076 (N.D. Fla. 1992) ("DeGrandy Panel") and later adopted by the Florida Legislature. The independent expert assembled the apportionment plan adopted by the Court from portions of other plans to create District 17 as a majority African-American district; District 18 as a super-majority Hispanic district; and District 23 as an African-American influence district. *See* 794 F.Supp. at 1087, 1088.

(b) After the United States Supreme Court decisions in *Shaw v. Reno* and *Miller v. Johnson,* the U.S. District Court for the Northern District of Florida ruled that District 3, which was created pursuant to the same congressional plan that created the districts at issue here was a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. *See, Johnson v. Mortham,* 915 F.Supp. 1529 (N.D. Fla. 1995).

(c) The Court in *Johnson* stated that "the

direct evidence of the DeGrandy panel's purpose, as evidenced by its opinion, the Special Master's report and recommendation, and the independent expert's report, would support" a conclusion that the redistricting plan adopted by that court "cannot be understood as anything other than an effort to segregate voters on the basis of race." *See* 915 F.Supp. At 1551.

(d) Based upon a review of the Court's Opinions in *DeGrandy v. Wetherell* and *Johnson v. Mortham* and the evidence presented in those two cases, including the special masters report, the parties agree that there is a reasonable factual and legal basis for the Plaintiffs' claims as they relate to Congressional districts 17, 18 and 23.

4. The parties further agree, for the purpose of settlement only, that there is not an adequate factual and legal basis for the plaintiffs' claim as it relates to the Florida Senate Districts 30 and 40, based upon the following stipulated facts.

(a) Unlike the Congressional districts, the Florida Senate districts in question were enacted by the Florida Legislature and were not subsequently modified by the courts. The districts reflect the end-product of a complex legislative process that involved a variety of competing interests.

(b) As a part of the overall redistricting process, the Florida Legislature commissioned, organized,

and developed a series of community outreach efforts, including two public hearings in the vicinity of each of the challenged districts. The Florida Senate district plan emerging from the Legislature reflected, to a large extent, an attempt to create districts representative of the State's diverse communities of interests.

1. **Florida Senate District 40**

(c) Florida Senate District 40 covers Monroe County, including the Florida Keys, and reaches into predominately Democratic areas of Miami-Dade County to create a district that is predominately Democratic. It is not predominately African-American. The voting age population of the District is 32.9% non-Hispanic Black and 23.4% Hispanic

(d) The Florida Legislature, in crafting Senate District 40, paid particular attention to the needs of the residents of the area by establishing a district in which their special interests and concerns would most likely be represented, while attempting to effectuate the traditional redistricting principles of compactness, regularity, and contiguousness. The shape of the district recognizes the integrity of county and city political subdivision boundaries, and is reasonably compact.

(e) The Florida Legislature, in crafting Senate District 40, also attempted to bring together

communities of interest. The residents of District 40 share common concerns, including but not limited to, sensitivity to agricultural, environmental and marine issues.

2. **Florida Senate District 30**

(f) Florida Senate District 30 unites the inner city communities along the urban corridor between the cities of West Palm Beach and Ft. Lauderdale.

(g) The Florida Legislature, in crafting District 30, recognized a commonality of interest within the District's communities that reflects the unique history of development in South Florida, where urban development occurred initially in strip along the major rail and highway corridors.

(h) As a result, the urban corridor in Broward and Palm Beach Counties has a distinct socio-economic profile, significantly different form the more affluent and more elderly populations in the suburban areas to the west and the coastal communities to the east. The urban corridor is predominated by commercial developments and low-income urban communities. As a result, these communities share many of the same common interests and concerns, including, but not limited to, economic redevelopment, the impact of suburban sprawl, and infrastructure improvements to address the aging roads, public utilities and schools.

(i) The District tracts a regular pattern along the urban corridor while attempting to effectuate the traditional redistricting principle of compactness, regularity and contiguousness.

(j) Although both parties acknowledge that race was a factor in crafting the District, the evidence reviewed by both parties, including the pertinent legislative record and court documents related to the 1992 Florida redistricting process, demonstrates that the design of District 30 was influenced significantly by political considerations and race was not the predominate factor.

(k) Based on these stipulated facts and the evidence reviewed by the parties, including legislative records related to the 1990-1992 redistricting process, the parties agree that the creation of Florida Senate Districts 30 and 40 does not infringe on the plaintiff's 14th and 15th amendment rights.

5. The parties also recognize that a settlement of the issues raised in this case will conserve resources, reduce risk, and obtain certainty and finality.

6. The parties therefore agree to a modification of the current Congressional redistricting plan (Plan 412) in the manner detailed in Appendix A and agree that pending the changes that will be required by the 2000 census, no modification is necessary to the current Florida Senate

redistricting plan.

7. The parties also agree that they will request that members of the public be given an opportunity to review this revised plan and express their views on the Settlement Agreement at a fairness hearing to be held before the three judge panel appointed to hear this case.

8. By agreeing to this settlement, plaintiffs agree to a complete settlement of this case and any constitutional claims they may have to the present congressional and state senate districts as modified herein.

9. The parties agree that out-of-cycle elections are unnecessary.

10. The plan finally approved by the Court will be used in congressional elections until the State of Florida enacts a new plan in accordance with the 2000 census and the requirements of federal and state law.

DATED this 17th day of August, 1999.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

THOMAS S. FOUTS et al,

Plaintiffs,

v. CASE NO.: 98-10031-Civ-Paine
Three Judge Court

SANDRA MORTHAM, et al,

Defendants.

JOINT MOTION TO APPROVE SETTLEMENT WITH MEMORANDUM

Comes now Plaintiffs and Defendants, together with those Intervenors who have joined herein, and respectfully requests that this Court approve the Settlement Agreement and enter the proposed order attached hereto to resolved the above styled case as follows:

1. Plaintiffs filed their Complaint alleging that Congressional Districts 17, 18, and 23 and Florida Senate Districts 30 and 40 were racial gerrymanders in violation of the Fourteenth Amendment to the United State Constitution.

2. Defendants and Defendant-Intervenors do not admit that either the congressional district or the Florida

senate districts are racial gerrymanders. For the purpose of settlement, however, the Defendants and the undersigned Intervenors agree that there is a reasonable factual and legal basis for Plaintiffs' claims as they relate to Congressional Districts 17, 18 and 23 and have signed a Settlement Agreement and filed it in Court, along with a map of the settlement plan accompanying statistics.

3. The Settlement Agreement provides for modification to the current Congressional District boundaries in the south Florida area and leaves the Florida senate districts intact. The Agreement modifies Congressional Districts 17, 18 and 23 and as a result of the changes, surrounding districts are modified to a minimal degree. The settlement plan complies with the constitution while minimizing disruption to the existing plan and resolves all claims and issues in this case.

4. Under the terms of the Agreement, the parties contemplate that the Court would hold a fairness hearing at which members of the public would be given an opportunity to express their view.

5. The settlement resolves the concerns raised by Plaintiffs in their Complaint in a manner that causes minimal disruption to the State redistricting plan, and this minimally affects third parties. The resulting plan is fair, reasonable, and does not violate federal law. For these

reasons, this Court should adopt the plan by entry of a final order at the conclusion of the fairness hearing.

WHEREFORE, the Plaintiffs and Defendants, together with the undersigned Intervenors, respectfully request that the Settlement Agreement filed herewith be approved and the plan submitted in accordance with the Agreement be adopted as the Congressional distributing plan.

DATED this 17th day of August, 1999.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 98-10031-Civ-Paine

THOMAS S. FOUTS, et al.,

Plaintiffs,

v. Three Judge Court

KATHERINE HARRIS, et al.,

Defendants.
_____/

ORDER

THIS CAUSE comes before the Court upon the Plaintiffs' Motion to Alter or Amend Judgment and/or for Reconsideration of Final Order of Dismissal on Grounds of Laches, filed November 4, 1999. The Plaintiffs seek to have the Court reconsider its dismissal of this case. As their principal grounds for such reconsideration, the Plaintiffs assert that "there is no basis for the application of the doctrine of laches in a case alleging any violation of voting rights act." Motion, p.2.

This is the third time that the Plaintiffs have made this argument. It has been rejected before, and raises nothing new here. Moreover, in making this argument for the third time,

the Plaintiffs once again utterly fail to address the case law cited by this Court in support of the application of laches to the instant case. See *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990); *MacGovern v. Connolly*, 637 F. Supp. 111 (D. Mass. 1986).

Therefore, upon due consideration, it is

ORDERED AND ADJUDGED that Plaintiffs' Motion to Alter or Amend Judgment and/or for Reconsideration of Final Order of Dismissal on Grounds of Laches, filed November 4, 1999, is DENIED.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 16th day of December, 1999.

ORIGINAL SIGNED
HONORABLE ROSEMARY BARKETT
UNITED STATES CIRCUIT JUDGE

ORIGINAL SIGNED
HONORABLE DONALD GRAHAM
UNITED STATES DISTRICT JUDGE

ORIGINAL SIGNED
HONORABLE JAMES C. PAINE
SR. UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

James L. Chandler, et. al.,

Plaintiffs

v.

KATHERINE HARRIS, in her official capacity as Secretary of the State of Florida, et. al.

Defendants.

CONGRESSWOMAN CARRIE P MEEK, M. ATHALIE RANGE, BETTY T. FURGUSON, MARLEINE BASTIEN, DR. BRADFORD E. BROWN, BENNIE MOORE, ERMEST, MAE ("PINKY") SANDS, and MIRIAM URRA.

Defendants-Intervenors

_____/

NIGHT BOX
FILED

JAN 13 2000

Case No.: 98-10031
Civ-Paine
Three Judge Court

NOTICE OF APPEAL

COME NOW the Appellants, JAMES L. MOORE, et al., Plaintiffs in the above named case, in accordance with 42 U.S.C. §2284, and pursuant to Rule 18 o fthe Rules of the Supremem Court, hereby files this notice of appeal and hereby appeals the Final Order of Dismissal filed October 25,

1999, where the Three Judge Court entered an Order on December 17, 1999, disposing of and ruling against Plaintiffs' Motion to Alter or Amend Judgment and / or Reconsideration of Final Order of dismissal on Grounds of Laches, making this matter ripe for appeal as a matter of right directly to the United States Supreme Court

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished to all listed on the attached Service List, via first calss United States mail this 13th day of January, 2000.

ORIGINAL SIGNED

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